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Executive Director

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AUG - 5 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

August 5, 1994

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**EX PARTE**

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Mail Stop 1170  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Dear Mr. Caton:

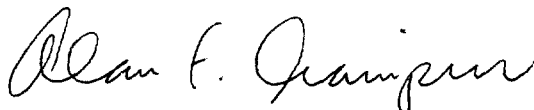
Re: *CC Docket No. 93-179, In the Matter of Price Cap Regulation of Local Exchange Carriers; Rate of Return Sharing and Lower Formula Adjustment*

Today, John W. Bogy, Senior Counsel, of Pacific Bell sent the attached letters to each FCC Commissioner. Please associate the attached letters with the above-referenced proceeding.

We are submitting two copies of this notice in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



**Attachments**

cc: Chairman Reed E. Hundt  
Commissioner Andrew Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello  
John W. Bogy, Pacific Bell

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John W. Bogy  
Senior Counsel  
Legal Department

140 New Montgomery Street  
San Francisco, California 95105  
(415) 542-7634

**PACIFIC BELL**  
A Pacific Telesis Company

RECEIVED

AUG - 5 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

August 5, 1994

Commissioner Reed E. Hundt  
Chairman, Federal Communications Commission  
Mail Stop Code 0101  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Dear Chairman Hundt:

We wish to voice our concern about the Common Carrier Bureau's apparent intention to impose a new rule retroactively, and therefore unlawfully.

The rule concerns the "add back" of prior year sharing or lower end adjustments to current year revenues to compute rates of return. In CC Docket No. 93-179 (a rulemaking), the Bureau has proposed that new language be added to Part 61 of the Commission's rules to require add back. We will not reiterate all of the reasons that an add back rule should not be adopted, even prospectively. These have been amply stated for the record elsewhere. What concerns us at the moment is the Bureau's apparent intention to apply any new rule retroactively to our 1994 annual access tariff. The Bureau has subjected these rates to investigation and possible refund pending the outcome of the add back rulemaking, even though they were prepared and filed in accordance with the current rules. We would like to draw your attention to reasons that giving retroactive effect to a new add back rule would not be upheld on appeal.

Retroactive rulemaking is forbidden to Federal agencies without express statutory authority to engage in it.<sup>1</sup> The Commission has no such express authority. Nor can it use an adjudicatory proceeding such as a Section 204 tariff investigation to apply new rules retroactively. In Motion Picture Ass'n v. Oman, the D.C. Circuit rejected just such an attempt to apply new rules retroactively under the guise of an adjudication.<sup>2</sup> The purpose of such an adjudicatory proceeding is to determine whether the tariff conflicts with a statute, agency regulation or order to which it is subject.<sup>3</sup> A tariff cannot be judged against "hitherto unmentioned tests."<sup>4</sup>

Some parties to the tariff investigations and the rulemaking have also contended that an add back rule would do no more than "clarify" the existing rules. We think this is somewhat disingenuous. There is nothing to clarify. The rules do not allude to add back even indirectly. The price cap orders speak more than once of a sharing or lower formula adjustment as a "one time adjustment" to a single year's rates.<sup>5</sup> Add back makes a single year's sharing or LFAM into a perpetual, compounding adjustment.

Two recent decisions by the D.C. Circuit bear strongly on these points. In the first, the Commission defended an amendment to AT&T's price cap rules by asserting that it was "clarification" and not rulemaking. The Commission lost that case.<sup>6</sup> In the second, the court strongly criticized

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<sup>1</sup> Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988); Motion Picture Ass'n of America v. Oman, 969 F.2d 1154, 1156 (D.C. Cir. 1992).

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<sup>3</sup> See Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

<sup>4</sup> Southwestern Bell Tel. Co. v. FCC (No. 93-1168, July 12, 1994), slip op., p. 7. See also NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

<sup>5</sup> Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd. 6786, 6803 (1990); on recon., 6 FCC Rcd. 2637, 2691, n.166 (1991).


<sup>6</sup> American Tel. & Tel. v. FCC, 974 F.2d 1351 (D.C. Cir. 1992).

the Commission for having rejected the OPEB tariffs by "concocting a new rule in the guise of applying the old."<sup>7</sup>

This case is even clearer. What the Bureau has initiated in CC Docket No. 93-179 is, on its face, a rulemaking that proposes substantive changes to Part 61. It may be (notwithstanding what the price cap orders said) that some in the Bureau were in favor of add back all along, and its omission from the price cap rules was an oversight. But even if it may amend the rules prospectively the Commission may not retroactively apply this "hitherto unmentioned test" to our tariffs.

Should you have any questions or wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,



John W. Bogy  
Senior Counsel

To: Commissioner Reed E. Hundt, Chairman  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello

cc: William E. Kennard, General Counsel  
A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau

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<sup>7</sup> Southwestern Bell Tel. Co. v. FCC, slip op., p. 15.

John W. Bogy  
Senior Counsel  
Legal Department

140 New Montgomery Street  
San Francisco, California 95105  
(415) 542-7634

**PACIFIC  BELL**  
A Pacific Telesis Company

August 5, 1994

Commissioner Andrew C. Barrett  
Federal Communications Commission  
Mail Stop Code 0103  
1919 M Street, N.W., Room 826  
Washington, D.C. 20554

Dear Commissioner Barrett:

We wish to voice our concern about the Common Carrier Bureau's apparent intention to impose a new rule retroactively, and therefore unlawfully.

The rule concerns the "add back" of prior year sharing or lower end adjustments to current year revenues to compute rates of return. In CC Docket No. 93-179 (a rulemaking), the Bureau has proposed that new language be added to Part 61 of the Commission's rules to require add back. We will not reiterate all of the reasons that an add back rule should not be adopted, even prospectively. These have been amply stated for the record elsewhere. What concerns us at the moment is the Bureau's apparent intention to apply any new rule retroactively to our 1994 annual access tariff. The Bureau has subjected these rates to investigation and possible refund pending the outcome of the add back rulemaking, even though they were prepared and filed in accordance with the current rules. We would like to draw your attention to reasons that giving retroactive effect to a new add back rule would not be upheld on appeal.

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John W. Bogy  
Senior Counsel

To: Commissioner Reed E. Hundt, Chairman  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello

cc: William E. Kennard, General Counsel  
A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau

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<sup>7</sup> Southwestern Bell Tel. Co. v. FCC, slip op., p. 15.

August 5, 1994

Commissioner Rachelle B. Chong  
Federal Communications Commission  
Mail Stop Code 0105  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Dear Commissioner Chong:

We wish to voice our concern about the Common Carrier Bureau's apparent intention to impose a new rule retroactively, and therefore unlawfully.

The rule concerns the "add back" of prior year sharing or lower end adjustments to current year revenues to compute rates of return. In CC Docket No. 93-179 (a rulemaking), the Bureau has proposed that new language be added to Part 61 of the Commission's rules to require add back. We will not reiterate all of the reasons that an add back rule should not be adopted, even prospectively. These have been amply stated for the record elsewhere. What concerns us at the moment is the Bureau's apparent intention to apply any new rule retroactively to our 1994 annual access tariff. The Bureau has subjected these rates to investigation and possible refund pending the outcome of the add back rulemaking, even though they were prepared and filed in accordance with the current rules. We would like to draw your attention to reasons that giving retroactive effect to a new add back rule would not be upheld on appeal.



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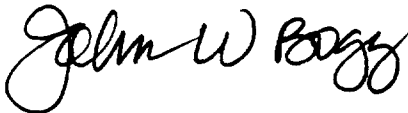
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John W. Bogy  
Senior Counsel

To: Commissioner Reed E. Hundt, Chairman  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello

cc: William E. Kennard, General Counsel  
A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau

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<sup>7</sup> Southwestern Bell Tel. Co. v. FCC, slip op., p. 15.

August 5, 1994

Commissioner Susan Ness  
Federal Communications Commission  
Mail Stop Code 0104  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Dear Commissioner Ness:

We wish to voice our concern about the Common Carrier Bureau's apparent intention to impose a new rule retroactively, and therefore unlawfully.

The rule concerns the "add back" of prior year sharing or lower end adjustments to current year revenues to compute rates of return. In CC Docket No. 93-179 (a rulemaking), the Bureau has proposed that new language be added to Part 61 of the Commission's rules to require add back. We will not reiterate all of the reasons that an add back rule should not be adopted, even prospectively. These have been amply stated for the record elsewhere. What concerns us at the moment is the Bureau's apparent intention to apply any new rule retroactively to our 1994 annual access tariff. The Bureau has subjected these rates to investigation and possible refund pending the outcome of the add back rulemaking, even though they were prepared and filed in accordance with the current rules. We would like to draw your attention to reasons that giving retroactive effect to a new add back rule would not be upheld on appeal.

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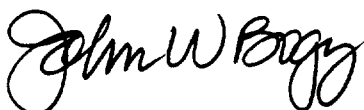
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John W. Bogy  
Senior Counsel

To: Commissioner Reed E. Hundt, Chairman  
Commissioner Andrew C. Barrett  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Commissioner James H. Quello

cc: William E. Kennard, General Counsel  
A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau

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<sup>7</sup> Southwestern Bell Tel. Co. v. FCC, slip op., p. 15.

August 5, 1994

Commissioner James H. Quello  
Federal Communications Commission  
Mail Stop Code 0106  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Dear Commissioner Quello:

We wish to voice our concern about the Common Carrier Bureau's apparent intention to impose a new rule retroactively, and therefore unlawfully.

The rule concerns the "add back" of prior year sharing or lower end adjustments to current year revenues to compute rates of return. In CC Docket No. 93-179 (a rulemaking), the Bureau has proposed that new language be added to Part 61 of the Commission's rules to require add back. We will not reiterate all of the reasons that an add back rule should not be adopted, even prospectively. These have been amply stated for the record elsewhere. What concerns us at the moment is the Bureau's apparent intention to apply any new rule retroactively to our 1994 annual access tariff. The Bureau has subjected these rates to investigation and possible refund pending the outcome of the add back rulemaking, even though they were prepared and filed in accordance with the current rules. We would like to draw your attention to reasons that giving retroactive effect to a new add back rule would not be upheld on appeal.

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